UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	Civil Action No. 96-1285 (RCL)
v.	
GALE A. NORTON, et al.,	
Defendants.	

REPLY MEMORANDUM IN SUPPORT OF THE MOTION OF THE UNITED STATES' FOR A PROTECTIVE ORDER AND TO QUASH THE SUBPOENAS ISSUED TO GOVERNMENT TRIAL ATTORNEYS PETRIE, QUINN AND SPOONER

Plaintiffs have noticed the depositions of Terry Petrie, Michael Quinn and Sandra Spooner for October 8, 14, and 17, 2003, respectively. On September 12, 2003, the United States moved for a protective order and an order quashing the subpoenas provided to the trial attorneys for defendants in this litigation. The memorandum in support of the motion (the "Supporting Memorandum") pointed out that any information that Ms. Spooner, Mr. Petrie and Mr. Quinn have which is related to any conceivable issue in this case was obtained in their capacities as litigation counsel, and plaintiffs' brief in opposition to the motion (the "Opposition Memorandum") does not contest that fact.

In the Supporting Memorandum, the government demonstrated that plaintiffs are not authorized to take the depositions of opposing counsel, including Ms. Spooner, Mr. Petrie and Mr. Quinn, except in limited circumstances that are not present here. Specifically, a party seeking to depose opposing counsel must meet the standards set forth in *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), and show that: (1) no means exist to obtain

the information other than deposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. Supporting Memorandum at 5-12. The government also pointed out that plaintiffs are precluded from taking any discovery at this time. Supporting Memorandum at 12-14. Finally, the government showed that a protective order is appropriate concerning the request for document production served with the notices of deposition.[1] The Opposition Memorandum does not contest that portion of the motion for a protective order which concerns the document production request. Therefore, the only remaining issue is whether the protective order should also be granted in regard to the requested depositions of litigation counsel.

A. Plaintiffs Have Not Demonstrated Why Depositions of Opposing Counsel Should Be Authorized.

The Opposition Memorandum argues that the Court's order entered September 17, 2002, *Cobell v. Norton* 226 F. Supp. 2d 1 (D.D.C. 2002), authorized plaintiffs to take full discovery. Opposition Memorandum at 4-5. Plaintiffs' assertion, however, that they have "full discovery rights" in this litigation, Opposition Memorandum at 5, begs the question of what the scope of those discovery rights are. The September 17, 2002 Order removed restrictions on discovery which had been previously imposed. *Cobell v. Norton* 226 F. Supp. 2d at 159. Nothing in that Order, however, indicates that the Court intended to abrogate the Federal Rules of Civil Procedure or case law governing the proper scope of discovery in a civil case. Therefore, plaintiffs have no greater discovery rights than a party in any civil case.

As discussed in the Supporting Memorandum, a civil litigant may not take the deposition of opposing counsel unless the party shows that the deposition is necessary to obtain non-

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[1] The United States also served plaintiffs with objections to the document request on September 18, 2003.

privileged information that is crucial to its case and which it cannot obtain from any other source. Plaintiffs have not attempted to make the showing required to depose the trial attorneys. Instead, plaintiffs present legal arguments which, again, beg the question posed by the motion for a protective order.

Plaintiffs argue that attorneys are not exempt from depositions. Opposition Memorandum at 6, 10-11 n.5. The United States does not contend that attorneys, even trial attorneys, are absolutely exempt from depositions. Instead, the United States contends that depositions of opposing counsel are disfavored and are permitted only when the attorney has non-privileged information relevant to the substantive claims or defenses in the case that cannot be obtained through other means. The United States' position is supported by the cases cited by plaintiffs. For example, plaintiffs cite *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 125 F.R.D. 578, 593 (N.D.N.Y. 1989), for the proposition that an attorney may not avoid a deposition by asserting that there is no relevant, non-privileged information. Opposing Memorandum at 10-11 n.5. The *Niagara* court recognized that "courts generally will permit the deposition of opposing counsel only upon a showing of substantial need and only after alternative discovery avenues have been exhausted or proven impractical." *Id.* at 593. Accordingly, the court stayed the deposition of the attorney until the opposing party had exhausted alternative means of obtaining the requested information. Here, as discussed below at pages 7-8, the plaintiffs have conducted full discovery regarding the issues of Ms. Erwin's December 2002 schedule and communications about that schedule.

Plaintiffs also argue that a protective order totally prohibiting a deposition is rarely granted absent extraordinary circumstances and cite *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301 (S.D. Fla. 1990). Opposition Memorandum at 10-11 n.5. However the

court in that case held that a party seeking to depose opposing counsel had the burden of demonstrating that the deposition was necessary to obtain information crucial to the substantive case which could not be obtained from other sources, and issued a protective order prohibiting the attorney's deposition. Plaintiffs also cite 7 James Wm. Moore, Moore's Federal Practice § 30.05 (1998) for the proposition that an attorney may be deposed. Opposition Memorandum at 6. Moore goes on to state, though, that a request to depose opposing counsel is generally viewed with disfavor and that most courts have mandated that a party seeking an attorney's deposition must "make at least a modest showing that the deposition is of significant utility or practical necessity," citing cases from every judicial circuit but the First Circuit. 7 James Wm. Moore, Moore's Federal Practice § 30.05 (1998), at 30-23 to 30-25. The treatise also notes that the "most influential case addressing attorney depositions appears to be *Shelton v. American Motors* . . . . [E]ven courts permitting attorney depositions and refusing to shift the burden of seeking a protective order have noted the influence of *Shelton* and the bulk of the case law auguring against attorney depositions." *Id.* at 30-24, 30-25.

In fact, in all of the cases cited in plaintiffs' brief in which a party sought to depose an attorney, the court undertook an analysis of the utility and necessity of the proposed deposition in light of the substantive factual issues in the case, and most of the cases cited by plaintiffs considered the factors which the United States argued in the Supporting Memorandum were relevant.[2] As discussed in the Supporting Memorandum, questions about Donna Erwin's

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[2] Plaintiffs have cluttered their brief with numerous irrelevant citations. *Clark v. United States*, 289 U.S. 1 (1933); *In re Impounded Case*, 879 F.2d 1211 (3d Cir. 1989); *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982); and *In re Sealed Case*, 676 F. 2d 793 (D.C. Cir. 1982), did not involve civil discovery. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1985); *Ellsworth Associates, Inc. v. United States*, 917 F. Supp. 841, 845 (D.D.C. 1996); and *Daniels v. Hadley Memorial Hospital*, 68 F.R.D. 583 (D.D.C. 1975), did not involve efforts to obtain

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availability for a deposition in December 2002 are not relevant now to any substantive issue in this case. Supporting Memorandum at 9-10. The Opposition Memorandum does not address this argument. The case upon which plaintiffs rely most heavily, *United Phosphorus, LTD v. Midland Fumigant, Inc.*, 164 F.R.D. 245 (D. Kan. 1995), applied the *Shelton* factors.[3] Other cases cited in the Opposition Memorandum which applied the *Shelton* factors include *Cascone v. Niles Home for Children*, 897 F. Supp. 1263 (W.D. Mo. 1995) (where issue in employment discrimination case was whether plaintiff or one of defendants' attorneys had particular job duties before the case was filed, court used *Shelton* factors to determine that attorney could be deposed on pre-suit actions not undertaken in preparation of litigation); *Chase Manhattan Bank, N.A. v. T& N PLC*, 156 F.R.D. 82 (S.D.N.Y. 1994) (deposition allowed of an attorney who was not a trial lawyer, and who had business as well as legal duties); *In re County of Orange*, 208 B.R. 117 (S.D.N.Y. 1997) (counsel for a third party had participated in events relevant to underlying claim); *Bogan v. Northwestern Mutual Life Insurance Co.*, 152 F.R.D. 9, 14 (S.D.N.Y. 1993); *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301 (S.D. Fla. 1990); and *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 125 F.R.D. 578 (N.D.N.Y. 1989).

Two Third Circuit cases cited by plaintiffs, *Frazier v. Southeastern Pennsylvania Trans. Auth.*, 161 F.R.D. 309, 313 (E.D. Pa. 1995), and *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 353 (D.N.J. 1990), applied a slightly

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[2](...continued)
discovery from an attorney. *Moody v. Internal Revenue Service*, 654 F.2d 795 (D.C. Cir. 1981); and *First Securities Savings v. Kansas Bankers Surety Co.*, 115 F.R.D. 181 (D. Neb. 1987), did not concern depositions.

[3] The *United Phosphorus* court said it was using the standards of *Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995). However, *Boughton* applied the *Shelton* factors. See Supporting Memorandum at 6.

different but complementary analysis, weighing (1) the extent to which the proposed deposition of an attorney promised to focus on central factual issues, (2) the availability of the information from other sources, and (3) the harm to the client's representational rights if the client's attorney were deposed. Even the cases cited by plaintiffs which criticized and did not apply the *Shelton* criteria, *Kaiser v. Mutual Life Insurance Company of New York*, 161 F.R.D. 378 (S.D. Ind. 1994); and *Qad, Inc. v. ALN Associates, Inc.*, 132 F.R.D. 492 (N.D. Ill. 1990) (cited by plaintiffs as *Gad, Inc. v. ALN Associates, Inc.*), permitted depositions of counsel only upon showings by the moving parties that the depositions were sought to obtain non-privileged information relevant to the substantive claims and defenses in the underlying case. Plaintiffs' apparent argument that they are entitled to take depositions of opposing counsel as a matter of course is not correct, even when the authority they cite is applied.

Plaintiffs recognize that there is authority that a party seeking to depose opposing counsel has the burden of persuasion that the deposition should be allowed, but contend that "this is not the rule in the D.C. Circuit; all of the cases in this Circuit that have considered this issue have remained faithful to the clear language and burden allocation presented in Rule 30(a)" [that the party moving for a protective order has the burden of persuasion]. Opposition Memorandum at 7-8 (footnote omitted). Plaintiffs are flatly wrong. Recent cases in the D.C. Circuit have determined that the party seeking to depose an opposing attorney has the burden of persuasion, and they have applied the *Shelton* factors in determining whether the party seeking the deposition has met the burden. See *Corporation for Public Broadcasting v. American Automobile Centennial Comm'n*, 1999 WL 1815561, at *1-2, (D.D.C. Feb. 2, 1999) (finding presumption against attorney depositions and holding, citing *Shelton*, that attorney depositions are allowed "only if the deposing party has met the following requirements: '(1) no other means exist to

obtain the information than to depose opposing counsel . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.'"); *Jennings v. Family Management*, 201 F.R.D. 272, 277 (D.D.C. 2001) ("[A] party seeking to depose an adversary's counsel must prove its necessity.").[4] In support of their erroneous contention, plaintiffs cite two, much earlier cases, *Dowd v. Calabrese*, 101 F.R.D. 427 (D.D.C. 1984); and *Daniels v. Hadley Memorial Hospital*, 68 F.R.D. 583 (D.D.C. 1975) (which did not involve an attempt to depose an attorney), but neither discussed the burden of persuasion.

In any event, the United States has demonstrated that depositions of the trial attorneys are not justified under any of the relevant factors. The Opposition Memorandum does not rebut, much less respond to, the United States' showing. Therefore, the United States prevails by default, no matter who has the burden of persuasion.

To the limited extent that plaintiffs address the relevant factors at all, their response is strictly rhetorical. One material factor in determining whether to permit a deposition of opposing counsel is whether the information is available from other sources. Supporting Memorandum at 7-8. Plaintiffs contend that they are entitled to discovery about Donna Erwin's December 2002 schedule and representations to the Court about that schedule. Opposing Memorandum at 3-5, 9-12. Plaintiffs simply ignore the fact that they already have conducted extensive discovery on these issues. As discussed in the Supporting Memorandum, at 4-5 and 8, during the Trial 1.5 discovery, plaintiffs deposed Ms. Erwin for one and a half days and her associate, Michele Singer, for a day on these issues, and also received an extensive production of documents from

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[4] The United States cited both *Corporation for Public Broadcasting* and *Jennings* in the Supporting Memorandum, and cited *Jennings* specifically in support of the argument that plaintiffs have the burden of persuasion.

the United States, including internal Department of Justice documents.[5] In light of the extensive discovery that has already occurred on this issue, plaintiffs' assertion that the United States is attempting a coverup, Opposing Memorandum at 3, 4, is absurd.

Although six months have passed since plaintiffs conducted the depositions and received the government documents, the Opposing Memorandum does not contain a single reference to that discovery. Plaintiffs do not identify any legitimate areas of inquiry that were not resolved by the discovery undertaken in February and March, or any issues justifying further inquiry that were identified during that discovery. Plaintiffs assert that they seek information regarding Mr. Quinn's statements to the Court at the December 13, 2002 hearing, and ask "Maybe he was told to do so? Maybe he decided to [do] so on his own?" Supporting Memorandum at 9. Mr. Petrie addressed those very questions during the hearing on December 17, 2002 – Mr. Quinn's statements were based on information given to Mr. Quinn by Mr. Petrie. Supporting Memorandum at 3. Mr. Petrie went on to explain that the error in Mr. Quinn's statements about Ms. Erwin's schedule was the result of inadvertent misunderstanding. The Opposition Memorandum is filled with unsupported charges of wrongdoing against the Department of Justice in general and the trial attorneys in particular. If there were any shred of evidence in the extensive discovery plaintiffs have conducted to support these charges, or for that matter, which would indicate that Ms. Erwin did anything wrong, plaintiffs would have certainly cited that evidence. Plaintiffs have cited nothing because there is nothing.[6]

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[5] Plaintiffs characterize Ms. Singer as an attorney in the Office of the Solicitor. Opposing Memorandum at 4. As plaintiffs well know, by December 2002 Ms. Singer had been detailed to Ms. Erwin's staff and was not acting as an attorney. See Appendix A to the Supporting Memorandum.

[6] Plaintiffs assert that Ms. Erwin traveled to Washington on December 16, 2002 to

(continued...)

Another relevant factor in determining whether a party may depose opposing trial counsel is whether the information sought is crucial to proof of the case. Supporting Memorandum at 9-12. This factor is narrower than the general rule that civil litigant may only initiate discovery on matters which are relevant to the claims and defenses in this case. Fed. R. Civ. P. 26(b)(1). At this point, plaintiffs do not have any current claims which may be the subject of discovery. The claims relevant to the issues tried in Trial 1.5 were resolved by the orders issued September 25, 2003.

In the Supporting Memorandum, the United States argued that the depositions of the trial counsel would not be relevant to any conceivable issue concerning the claims of plaintiffs or the defenses of defendants to those claims which may arise in the case. Supporting Memorandum at 9-10. Because the United States has raised a relevancy objection, plaintiffs must demonstrate that the information sought is relevant and discoverable. See *Alexander v. Federal Bureau of Investigation*, 194 F.R.D. 316, 325 (D.D.C. 2000).

> [a] showing of relevance can be viewed as a showing of need[, as] for the purpose of prosecuting or defending a specific pending civil action, one is presumed to have no need of matter not relevant to the subject matter involved in the pending action.

Chaplaincy of Full Gospel Churches v. Johnson, 2003 WL 22048206, at * 4 (D.D.C. Sept. 2, 2003) *(quoting Friedman v. Bache Halsey Stuart Shields, Inc.,* 738 F.2d 1336, 1341 (D.C. Cir.

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[6](...continued)
participate "in a meeting here, a meeting that she had long been scheduled to appear." [sic]. Opposition Memorandum at 2. Plaintiffs' counsel certainly know, if not from their own participation in Task Force meetings, then from the exhibits to Ms. Erwin's deposition, that the assertion that either the meeting or Ms. Erwin's appearance at the meeting "had long been scheduled" is not true. See Exhibit 2 to the Deposition of Donna Erwin, February 12, 2003, pages PDR001OSTABQ0002000019, PDR001OSTABQ000500003, and PDR001OSTABQ000500018 (Attachment A to this memorandum).

1984)). Consequently, plaintiffs must show that the discovery requested is needed in order to prosecute a specific claim in this case.

In the Opposition Memorandum, plaintiffs do not even pretend that the depositions of trial counsel would develop information relevant to any substantive issue on the merits of this case. Instead, plaintiffs are quite clear that they seek discovery of the trial attorneys solely to investigate whether the attorneys should be sanctioned for prior actions. Opposition Memorandum at 4, 9, 11. But a belief that an opposing counsel may deserve sanctions is not a "claim" or "defense" as those words are used in the Federal Rules of Civil Procedure, and cannot be a basis for discovery, unmoored from any substantive issue in the underlying case.

The Opposition Memorandum indicates that plaintiffs' counsel believe that they have somehow been deputized as a sort of independent prosecutor, authorized to use the discovery mechanisms of the Federal Rules of Civil Procedure to investigate opposing counsel and others. Opposition Memorandum at 2, 9-12. The basis for the apparent belief of plaintiffs' counsel is unclear. Plaintiffs have not cited any cases in which a deposition of an opposing attorney was sought and allowed for the purposes of investigating whether the attorney should be sanctioned. Plaintiffs do cite cases that allowed depositions because an attorney's actions were "the basis of the claim," Opposition Memorandum at 11, but each of those cases was concerned with pre-litigation actions of a lawyer that were relevant to the substantive claim on which the party sought judgment. That is not so here.

The Orders in this case cited in the Opposition Memorandum provide no basis for plaintiffs' apparent belief that they may use discovery to investigate opposing counsel. The Order of September 17, 2002 merely afforded plaintiffs the ordinary and customary discovery privileges had been restricted by a prior order in this case. Although plaintiffs quote at length

from the Order issued February 5, 2003, Opposition Memorandum at 2-3, they studiously avoid the actual ordering paragraph relating to the discovery allowed. As discussed in the Supporting Memorandum, that order directed a further deposition of Donna Erwin to "respond to the questions set forth in the plaintiffs' above-mentioned motion to compel, and all other questions related to the subject matter of those questions." Supporting Memorandum at 4. The further deposition of Donna Erwin was taken seven months ago. No other discovery was compelled by that order.

Moreover, plaintiffs' effort here to depose opposing counsel solely to investigate allegations of past misconduct raises serious concerns which this Court recently addressed in *Landmark Legal Foundation v. EPA*, 2003 WL 21715678 (D.D.C. July 25, 2003). In that case, the Court quoted *Evans v. Williams*, 206 F.3d 1292, 1294-95 (D.C. Cir. 2000), to explain the difference between civil and criminal sanctions:

> Traditionally, whether a contempt is civil or criminal has depended on the character and purposes of the sanction. A sanction is considered civil if it is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court.

Landmark Legal Found. v. EPA, 2003 WL 21715678, at * 3. This Court went on to state that "[B]ecause the purpose of a civil contempt proceeding is to vindicate the rights of the non-violating party, not to punish the violator, the relief granted will be either coercive or compensatory." *Id.* The Court further explained

> civil and criminal contempt differ in that the proceedings are directed by different parties. A civil contempt proceeding is initiated by the party alleging that it was harmed . . . . [B]y contrast, it is the court that makes the initial decision whether a criminal contempt proceeding should take place. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 807, 107 S.Ct. 2124, 95 L. Ed.2d 740 (1987). Once initiated, the court should request the appropriate prosecuting authority to prosecute the criminal contempt . . . . It has been held to be reversible error to appoint counsel for an interested party in the proceedings to be a private

> prosecutor. See [*Young v. United States ex rel. Vuitton et Fils, S.A.*] at 814, 107 S.Ct. 2124.

Landmark Legal Found. v. EPA, 2003 WL 21715678, at * 4. The issue surrounding Donna Erwin's schedule and statements to the Court about that schedule have resulted in two orders. The first, on December 17, 2002, directed that Ms. Erwin be deposed in Washington. The second, on February 5, 2003, granted plaintiffs' motion to compel, directed Ms. Erwin to appear again to answer specific questions, and awarded sanctions. These orders have granted full relief to plaintiffs. Any other sanctions arising from this incident would be purely punitive, and plaintiffs do not contend otherwise. As this Court stated in *Landmark*, plaintiffs' counsel are not allowed to act as private prosecutors in this matter.[7]

Plaintiffs' clearly expressed intention to use discovery to pursue punishment against opposing counsel implicates the core reasons why depositions of attorneys are disfavored. Plaintiffs assert that the animating concern in cases limiting attorney depositions is that the only information attainable is privileged or work product. Opposition Memorandum at 9 n.4. These are important considerations, but are not the only considerations. The rationale of the *Shelton* court is worth repeating here:

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing opposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her

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[7] Further, the Court of Appeals held on July 18, 2003 that district courts are not empowered to appoint agents to function in "an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system." *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003).

> opponent. Moreover, the "chilling effect" that such practice will have on the truthful communications from the client to the attorney is obvious.

Shelton v. American Motors Corp., 805 F.2d at 1327. The United States noted in the Supporting Memorandum that much of the time during the Erwin and Singer depositions was consumed on efforts by plaintiffs to elicit privileged information on subjects totally unrelated to Ms. Erwin's December 2002 schedule and her communications with attorneys about her schedule. Supporting Memorandum at 11. The United States also expressed concerns that the document production requests submitted by plaintiffs with the notices of the attorney depositions indicated that plaintiffs would continue that course if they were permitted to depose trial attorneys. *Id.* The Opposition Memorandum indicates that this is precisely plaintiffs' intention -- the depositions would be used to provoke new confrontations over privileges and generate additional Rule 37 proceedings. Opposition Memorandum at 9-11, at 9-10 n.4 and 10-11 n.5.

It is difficult to think of a course of conduct more designed to disrupt the adversarial system, lower the standards of the profession, and add to the time and costs of litigation than the course on which plaintiffs' counsel have embarked. The structural injunction issued by this Court on September 25, 2003, imposes extensive reporting requirements on the United States during the next 120 days. Government counsel should be free to devote their time and efforts to assisting their client in discharging these obligations without fear of being interrogated by plaintiffs' counsel. This Court has frequently reminded attorneys for the United States in this case of their obligations as officers of the Court, and we are well aware of those obligations. But plaintiffs' counsel are also officers of the court and members of the legal profession, and they also have obligations to the Court, to the profession, and to the public. Using their position to harass an adversary, whether that adversary is an attorney or not, is not in accord with their

obligations and does not serve the interests of justice. The Court should not give license to such conduct.

B. Discovery Is Closed.

As the United States argued in the Supporting Memorandum, plaintiffs are not authorized to take any discovery at this time. Supporting Memorandum at 13. Plaintiffs contend that the September 17, 2002 order granted them unending discovery rights. Opposition Memorandum at 4-6. There is no basis for this contention. Following the September 17, 2002 Order on which plaintiffs rely, the Court signed, on October 17, 2002, a Trial 1.5 discovery scheduling order, which was attached to the Supporting Memorandum as Attachment B. Under the discovery scheduling order, fact discovery closed on March 24, 2003, and all discovery terminated on April 10, 2003. Trial 1.5 has been completed, and on September 25, 2003, the Court issued its judgment on that phase of this proceeding. The Court's orders establish a series of deadlines through September 30, 2007, for the Department of Interior to perform specific tasks. Under the schedules established by the Court's September 25, 2003 orders, it is likely that there will be a Phase II trial, and it is likely that there will be discovery after September 2007 associated with the Phase II trial. However, at this point discovery is not open.

Plaintiffs assert that "[R]ule 30(a) of the Federal Rules of Civil Procedure provides, in pertinent part that '[a] Party may take the deposition of any person including a party upon oral examination without leave of court.'" Opposition Memorandum at 6 (emphasis omitted). Actually, Rule 30(a) states, in the part pertinent to the current motion, that "[a] Party may take the deposition of any person including a party upon oral examination without leave of court except as provided in paragraph (2)." As discussed in the Supporting Memorandum (at 12-13), the parties have not held a discovery planning conference pursuant to Federal Rule of Civil

Procedure 26(f) for any stage of this case subsequent to Trial 1.5, and therefore, pursuant to Fed. R. Civ. P. 30(a)(2)(C) and 26(d), plaintiffs are not authorized to take any depositions at this time.

C. Plaintiffs Are Not Entitled to Sanctions.

Plaintiffs request an award of sanctions. Opposition Memorandum at 12. The request should be denied. The United States' motion for a protective order is meritorious, and therefore an award of sanctions is unwarranted. Even if the Court ultimately decides that the depositions should be held, however, several formal defects in the manner in which plaintiffs have proceeded preclude an award of sanctions. Although plaintiffs gave the prospective deponents subpoenas, plaintiffs did not tender the required attendance and milage fee. Therefore, the service of subpoenas is defective.

A party moving for relief under Rule 37 is required to certify that he has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. Fed. R. Civ. P. 37(a)(2)(B). Plaintiffs have not provided such a certification, and they could not, since they have not attempted in good faith to resolve these issues without court action. The Opposition Memorandum does represent that plaintiffs complied with Local Rule 7.1(m) by leaving a message with Sandra Spooner. Opposition Memorandum at 1 n.1. We doubt that plaintiffs' practice, followed in this instance, of leaving a voice mail message an hour or so before filing complies with the requirements of Local Rule 7.1(m), particularly where, as here, the voice mail was not directed to one of the attorneys whose name appeared on the motion for a protective order or the Supporting Memorandum. The practice clearly does not comply with their obligations under Rule 37.[8]

[8]For the same reason, plaintiffs have not properly made their motion to compel.

CONCLUSION

For the foregoing reasons, the United States requests that the Court enter an order granting the motion for a protective order and quashing the subpoenas served on Sandra Spooner, Terry Petrie and Michael Quinn, and denying plaintiffs' motions to compel and for sanctions.

Respectfully submitted,

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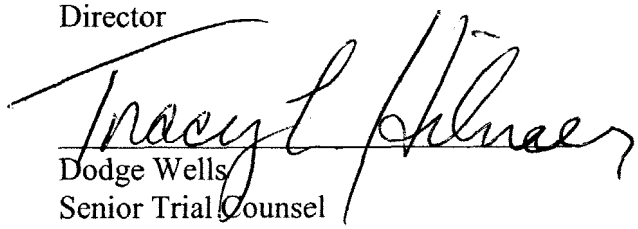

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DATED: October 3, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	Civil Action No. 96-CV-1285 (RCL)
v.	)	
GALE A. NORTON, et al.,	)	
Defendants.	)	

ORDER

Upon consideration of *Plaintiffs' Motion to Compel and Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 37* (dated Sept. 26, 2003), Interior Defendants' opposition thereto and the entire record in this case, it is this _____ day of _____, 2003, hereby

ORDERED that Plaintiffs' Motion be, and hereby is, DENIED.

_____
HON. ROYCE C. LAMBERTH
United States District Judge

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12/10/2002 03:48 PM

To: Donna Erwin/OST/OS/DOI@DOI
cc: Connie Wilkie/OST/OS/DOI@DOI, Michele Singer/OST/OS/DOI@DOI
Subject: Meeting on Integrated IT needs of ITT/BIA/OST/&OHTA

Jim Cason's office has scheduled a meeting for Tuesday, December 17th, at 9-10:30AM (EST) RE the above subject w/Ross, Hord Tipton, Brian Burns, and Donna. It'll be in Rm. 6119.

FYI - I talked to Jean Maybee in AS/IA this afternoon, and she said she is still trying to find a location for a Task Force meeting on Monday & Tuesday, 12/16&17.

ATTACHMENT A
Reply in Support of Motion for
P.O. & Quash Subpoenas

PHONE CALL

FOR Donna DATE 12/10/02 TIME 330 A.M. P.M.
M Tiffany Chevvront
OF USET
PHONE/MOBILE 615-872-7900 FAX
MESSAGE RE: DC Meeting on Dec 16th & 17th. Call when you get a chance
SIGNED Theresa

- [x] TELEPHONED
- [ ] RETURNED YOUR CALL
- [x] PLEASE CALL
- [ ] WILL CALL AGAIN
- [ ] CAME TO SEE YOU
- [ ] WANTS TO SEE YOU

1154

* Left voice message

PHONE CALL

FOR Leita DATE 12/10/02 TIME 515 A.M. P.M.
M Glenda Miller
OF
PHONE/MOBILE 907-543-7351 FAX
MESSAGE The fax number Glenda gave you is not a good one (Fax out of Toner). please use fax # 907-543-3596
SIGNED Theresa

- [x] TELEPHONED
- [ ] RETURNED YOUR CALL
- [ ] PLEASE CALL
- [ ] WILL CALL AGAIN
- [ ] CAME TO SEE YOU
- [ ] WANTS TO SEE YOU

1154

PHONE CALL

FOR Ken R. DATE 12/11/02 TIME 930 A.M. P.M.
M Anson Baker
OF
PHONE/MOBILE 503-231-6722 FAX
MESSAGE
SIGNED Theresa

- [x] TELEPHONED
- [ ] RETURNED YOUR CALL
- [x] PLEASE CALL
- [ ] WILL CALL AGAIN
- [ ] CAME TO SEE YOU
- [ ] WANTS TO SEE YOU

1154

PHONE CALL

FOR Ken R. DATE 12/11/02 TIME 935 A.M. P.M.
M Sharon Smith
OF
PHONE/MOBILE 202-208-4931 FAX
MESSAGE Re: Philip Viles Where do I place him on the chart if he's with OST =
SIGNED Theresa

- [x] TELEPHONED
- [ ] RETURNED YOUR CALL
- [x] PLEASE CALL
- [ ] WILL CALL AGAIN
- [ ] CAME TO SEE YOU
- [ ] WANTS TO SEE YOU

1154

OMEGA WORLD TRAVEL

:WIN/DONNA **Attention: CONNIE** 10-Dec-2002 3:54 pm
Page 1 of 1

e booking locator is OD6Y6D.

-Dec-2002
nday

Hotel Marriott Hotels Marriott Jw Hotel
1331 PENNSYLVANIA AVE WASHINGTON DC 20004
Phone: 202-393-2000 Fax: 202-626-6991
Number of Rooms: 1 Rate: 150.00USD
Confirmation: 85711030#MC# Room Guaranteed
Check Out: 17-Dec-2002 Tuesday
Cancellation note: CANCEL BY 6PM DAY OF ARRIVAL

-Jun-2003
nday

MISC

ASSOCIATE NAME GROUND BOOKING ONLY

OMEGA MEGAFAX

****
PLEASE CHECK-IN FOR DOMESTIC FLIGHTS 1 HOUR PRIOR
TO SCHEDULED DEPARTURE
CHECK-IN FOR INTERNATIONAL FLIGHTS IS 2 HOURS
PRIOR TO SCHEDULED DEPARTURE
****
LET US KNOW HOW WE ARE DOING...AT YOUR CONVENIENCE
PLEASE TAKE A MOMENT TO COMPLETE OUR USER SURVEY
AT WWW.OWT.NET/GOVERNMENT/DOI/INDEX.HTML
****
U8-505-816-1314 CONNIE-
S*G00
U3-15000
REMEMBER TICKETS ARE WORTH MONEY...PLEASE NOTIFY YOUR TMC
OR AGENCY TRAVEL COORDINATOR OF UNUSED TICKETS OR CANCELLED TRIPS.
PLEASE DO NOT WRITE ON UNUSED TICKETS.
BA-1315
FOR TRAVEL ASSISTANCE BETWEEN THE HOURS OF
730A-530P MOUNTAIN PLEASE CALL 877-434-1562
FOR AFTER HOURS EMERGENCY ASSISTANCE PLEASE CALL
800-964-6342 AND ADVISE I.D.CODE W-4HT-OS

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on October 3, 2003 I served the foregoing *Reply Memorandum in Support of the Motion of the United States' Motion for a Protective Order and Motion to Quash the Subpoena Issued to Government Trial Attorneys Petrie, Quinn and Spooner* by facsimile in accordance with their written request of October 31, 2001 upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 822-0068

Dennis M Gingold, Esq.
Mark Kester Brown, Esq.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005
(202) 318-2372

Per the Court's Order of April 17, 2003,
by facsimile and by U.S. Mail upon:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
(406) 338-7530

By U.S. Mail upon:

Elliott Levitas, Esq
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

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O'Melveny & Myers, LLP
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Kevin P. Kingston